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No. 249

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1933.

LIVINGSTON H. McCREA,
Petitioner,

versus

UNITED STATES OF AMERICA, as owner of the S. S. American Shipper, Engines, Tackles, Apparatus, Etc.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

JOHN M. SCOBLE,
Proctor for Petitioner.

K. COURTENAY JOHNSTON,
of Counsel.

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IN THE

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LIVINGSTON H. McCREA,
Petitioner,

versus

UNITED STATES OF AMERICA, as owner of the S. S. American Shipper, Engines, Tackle, Apparatus, Etc.,
Respondent.

PETITION FOR WRIT OF CERTIORARI.

May it please the Court:

The petition of Livingston H. McCrea respectfully shows to this Honorable Court:

A. Summary Statement of the Matters Involved.

(1) The denial of the right of the petitioner to a judgment or decree *in personam* for the statutory double wages, the relief provided by U. S. Code, Title 46, Section 596, incurred by reason of the refusal and neglect of the respondent, the United States, to pay petitioner the wages claimed by him in his libel and found to be due on account of the violation of U. S. Code, Title 46, Section 673 by the respondent, the United States, on the ground that said double wages provided for by said U. S. Code, Title 46, Section 596

did not constitute compensation or wages, but constituted a penalty, and could not be recovered against the respondent, the United States (Assignments of Error Nos. 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 39, R., 172-179; Assignments of Error Nos. 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 39, R., 201-209).

(2) The denial of the right of the petitioner, an unpaid seaman, to a judgment or decree *in personam* for the statutory double wages, the relief provided by U. S. Code, Title 46, Section 596, incurred by reason of the refusal and neglect of the respondent, the United States, to pay petitioner the wages claimed by him in his libel and found to be due on account of the violation of U. S. Code, Title 46, Section 673 by the respondent, the United States, on the ground that said double wages provided for by said U. S. Code, Title 46, Section 596 did not constitute compensation or wages, but constituted a penalty, and could not be recovered against the respondent, the United States; and on the ground that the said respondent, the United States, did not divest itself of all sovereign character and waive immunity by entering into commercial business in competition with private owners and by and under the Suits in Admiralty Act of March 9, 1920, Chapter 95, Sections 1, 2, 6, (46 U. S. C. A. 741, 742, 746), (Assignments of Error Nos. 30, 31, 32, 33, 34, 35, 36, 37, R., 176-178; Assignments of Error Nos. 30, 31, 32, 33, 34, 35, 36, 37, R., 205-207).

(3) The failure of the United States Circuit Court of Appeals to hold that if the statutory relief of double wages, provided for in U. S. Code, Title 46, Section

596, is a penalty, that the respondent, the United States, divested itself of all sovereign character and waived immunity by entering into commercial business in competition with private owners, and by reason of or under the Suits in Admiralty Act of March 9, 1920, Chapter 95, Sections 1, 2, 6, (46 U. S. Code 741, 742, 746), (Assignments of Error Nos. 30, 31, 32, 33, 34, 35, 36, 37, R., 176-178; Assignments of Error Nos. 30, 31, 32, 33, 34, 35, 36, 37, R., 205-207).

(4) The failure of the United States Circuit Court of Appeals to hold that Sections 596, 673, 741, 742 and 746 of U. S. Code, Title 46 were parts of the contract between the petitioner herein and the respondent, the United States, and that the respondent, the United States, having violated Section 673 of U. S. Code, Title 46, the petitioner was entitled to all the relief provided for in said Section 673 of U. S. Code, Title 46, and also to the relief provided for in Section 596 of U. S. Code, Title 46, and Section 685 of U. S. Code, Title 46.

(5) The denial of the right of the petitioner, an unpaid seaman discharged in a foreign country, to a judgment or decree *in personam* against the respondent, the United States, for one month's pay and the cost of transportation back to the United States, as provided for in U. S. Code, Title 46, Section 685 (R. S. 4583), in addition to his discharge and wages earned under Section 2 of the Act of March 4, 1915, (46 U. S. Code 672), on the ground that said relief provided for by Section 2 of the Act of March 4, 1915 (46 U. S. Code 673), was exclusive (Assignments of Error Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 39, R., 170-172, 179; Assignments

of Errors Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 39, R., 199-201, 208).

(6) The denial of the right of the petitioner, an unpaid seaman discharged in a foreign country by reason of the violation by the respondent of U. S. Code, Title 46, Section 673, to a judgment or decree *in personam* against the respondent, the United States, for one month's pay and the cost of transportation back to the United States, as provided for in U. S. Code, Title 46, Section 685 (R. S. 4583), in addition to his discharge and wages earned under Section 2 of the Act of March 4, 1915, (46 U. S. Code 673), on the ground that the petitioner was not discharged by the United States Consul at London, Kingdom of Great Britain, and that said petitioner was a deserter (R., 220, 221).

(7) The finding of the United States Circuit Court of Appeals that the petitioner "deserted his ship" after the respondent, the United States, had violated U. S. Code, Title 46, Section 673, and the petitioner had become entitled to his discharge and wages earned, for the reason that he was not discharged by the United States Consul at London, Kingdom of Great Britain (R., 220, 221).

(8) Whether it was proper for the United States Circuit Court of Appeals to hold that the action of the District Court, in allowing a reargument of the case on the ground that the relief, provided for by U. S. Code, Title 46, Section 596, was a penalty and that the respondent, the United States, could not be held for a penalty, was correct, in view of the fact that the respondent, the United States, had not pleaded that the

relief, provided for by U. S. Code, Title 46, Section 596, was a penalty and that said respondent, the United States, had made no motion to amend its pleadings. (Assignment of Errors, 38, R., 207.)

(9) The finding of the United States Circuit Court of Appeals that the entry of the judgment or decree of August 15, 1932 was irregular, and that said decree was vacated and set aside by a granting of a rehearing after the entry of the said judgment or decree of August 15, 1932 (Assignments of Error Nos. 40, 41, 42, 43, R., 208-209).

B. Reasons Relied on for Allowance of Writ.

Because the Circuit Court of Appeals for the Second Circuit has:

(1) Rendered a decision in conflict with the Fifth Amendment to the Constitution of the United States, the opinions and decisions of this Court, the decisions of the United States Circuit Court of Appeals for the Ninth Circuit, and the United States District Court for the districts of Maryland, South Carolina, and Massachusetts, as well, as the courts of last resort in the State of New York and the State of Massachusetts, so that a review of this Court is necessary for uniformity of decision in the federal and state courts in respect to highly remedial federal statutes and constitutional questions.

(2) Decided important questions of general law in a way untenable and in conflict with the weight of authority.

(3) Decided important questions of federal law which have not been, but should be settled by this Court.

(4) Decided federal questions in a way that conflicts with the Fifth Amendment to the Constitution of the United States, applicable decisions of this Court, and the judicial history of U. S. Code, Title 46, Sections 596, 673, 685, 741, 742 and 746.

(5) So far departed from the accepted and usual course of judicial proceedings, and has so far sanctioned such a departure by the United States District Court for the Southern District of New York, as to call for an exercise of this Court's power of supervision.

WHEREFORE, it is respectfully submitted that this petition for a writ of certiorari, to review the decision of the United States Circuit Court of Appeals for the Second Circuit, should be granted.

John M. Scoble,

JOHN M. SCOBLE,
Proctor for Petitioner.

K. COURTENAY JOHNSTON,
of Counsel.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933.

LIVINGSTON H. MCCREA,

Petitioner,

versus

UNITED STATES OF AMERICA, AS OWNER OF THE S. S. AMERICAN SHIPPER, ENGINES, TACKLE, APPARATUS, ETC.,

Respondent.

BRIEF IN SUPPORT OF PETITION.

I. The Decisions of the Courts Below.

The decision of the United States Circuit Court of Appeals for the Second Circuit was rendered on April 29, 1934 (R., 216-221). It is reported in 70 Fed. (2) 632. On May 7, 1934 the decree of the United States Circuit Court of Appeals, affirming the decree of the District Court, was entered (R., 221).

The decree of the United States District Court for the Southern District of New York, dated August 12, 1932, and entered August 15, 1932, appears on pages 153 and 154 of the record.

The opinion of Judge Knox of the United States District Court, dated July 26, 1932, appears on pages 141-150 of the record, and is reported in 3 Fed. Sup. 184.

The decree of the United States District Court, dated March 8, 1933, and entered March 9, 1933, appears on pages 164 and 165 of the record.

The opinion of Judge Knox of the United States District Court, dated February 10, 1933, appears on pages 156-163 of the record, and is reported in 3 Fed. Sup. 184, 187.

II. Jurisdiction.

(1) The date of the decree to be reviewed is May 7, 1934, and will be found on page 221 of the record.

Grounds of This Court's Jurisdiction.

(2) This case involves important questions of maritime law, affecting seamen and shipping interests generally, which frequently arise before both federal and state tribunals, but have not heretofore been definitely decided by this Court, and which, for the information of the bench and bar of this country, should be determined, pursuant to U. S. Code, Title 28, Section 347(a), (R., 169-179, 198-209, 216-221).

(3) Construction of U. S. Code, Title 46, Sections 596, 673, 685, 741, 742 and 746, and the cognate provisions of the Seamen's Acts of June 7, 1872, March 4, 1915, and March 9, 1920.

(4) Construction of the Fifth Amendment to the Constitution of the United States, particularly that portion thereof which provides that no person shall "be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use without just compensation."

III. Statement of the Case.

A. THE FACTS.

The S. S. *American Shipper* was owned by the United States (R., 16-17) and registered in the name of the United States Shipping Board (Respondent's Ex-B, p. 131), and was operated as a merchant vessel engaged in the common carriage of goods and passengers by sea for hire. This is admitted by the respondent (R., 4, 13-15; Respondent's Exhibit B, R., 131). This was also found by the decision of the United States Circuit Court of Appeals (R., 216). It was also found by the United States Circuit Court of Appeals that the S. S. *American Shipper* was subject to the provisions of Section 2 of the Seamen's Act of March 4, 1915 (46 U. S. Code, Sec. 673) (R., 216).

On February 15, 1928, the libellant, petitioner herein, signed shipping articles for a voyage on the S. S. *American Shipper* from the Port of New York to the Port of London, Kingdom of Great Britain, and return, at wages of $65 per month (R., 7).

The S. S. *American Shipper* carried on said voyage a crew of ten able seamen, two ordinary seamen, and one additional person who was rated as an able seaman (R., 17-18, 62, 143). She also carried six firemen, three water tenders and eight oilers (R., 18).

On the voyage from the Port of New York to the Port of London the crew of the vessel S. S. *American Shipper* was not divided into equal watches as required by Section 2 of the Seamen's Act of March 4, 1915 (46

U. S. Code, Sec. 673). This appears even accepting the testimony offered by the respondent (R., 143).

On arrival at the Port of London the libellant, the petitioner herein, demanded his discharge from the vessel and the payment of his wages earned on the ground of the violation of Section 2 of the Seamen's Act of March 4, 1915 (46 U. S. Code, Sec. 673). He also demanded one month's additional pay and transportation back to the United States under the provisions of R. S. 4583 (U. S. Code, Title 46, Sec. 685) (R., 55, 129-130). These demands were refused. At that time he was not entitled to and did not demand any double wages under the provisions of U. S. Code, Title 46, Section 596; R. S. 4529. At the request of the captain, the libellant, petitioner herein, went to the office of the American Consul next morning and made a full statement of the case to him. The Consul stated that even if Section 2 of the Seamen's Act of March 4, 1915 (46 U. S. Code, Sec. 673) had been violated, he did not think the libellant, petitioner herein, was so affected that he was entitled to his discharge, and he refused to discharge him (R., 107, 118, 119, 120). The libellant returned to the vessel and did his utmost to see the captain, but was unable to do so. He later left the vessel without having been paid any part of the wages due him, and was not even permitted to take his clothes. The vessel sailed for the Port of New York on March 2, 1928. The libellant, petitioner herein, was unable to secure money to pay his transportation back to the United States for three or four weeks. As soon as he could do so he returned to the United States (R., 23, 29-30).

B. THE PROCEEDINGS IN THE TRIAL COURT.

The action was begun by the libellant, the petitioner herein, on or about July 9, 1928. In his libel he demanded judgment for the wages due him on February 26, 1928, one month's additional wages, the amount of costs incurred in securing transportation back to the United States, the return of his clothes, and also two days pay for each of the days the wages due him were not paid from the time of demand until the time when the same were paid (R., 3-12).

The respondent (R., 13-15) admitted that the S. S. *American Shipper* was a merchant vessel and carried passengers and merchandise consigned to and shipped by private parties.

The action came on for trial before Judge Knox on May 6, 1932 (R., 16).

On or about July 26, 1932, Judge Knox handed down his decision (R., 141-150). He held that even according to the testimony submitted by the respondent, Section 2 of the Act of March 4, 1915 (46 U. S. Code, Sec. 673) had been violated, and that the libellant, petitioner herein, was entitled to his discharge and the wages earned at that time (R., 143). He also held that:

> "* * * The right of libellant to his pay, under the Luckenbach decision was so obvious that the delay in making payment of this item since the libel was filed, cannot be said to have come about from a 'sufficient cause' ",

and that the libellant, the petitioner herein, was entitled to two days pay for one from the time of the commencement of the action to the date of the entry of the decree (R., 150).

The Trial Court also held that the libellant, the petitioner herein, was not entitled to one month's additional pay and the cost of transportation back to the United States, as provided for by R. S. 4583 (46 U. S. Code, Sec. 685), for the reason that the relief, provided for by Section 2 of the Act of March 4, 1915 (46 U. S. Code, Sec. 673) for the violation of said section, was exclusive (R., 144-146).

The decree was signed by Judge Knox on Friday, August 12, 1932, (R., 153) and was entered on Monday, August 15, 1932 (R., 154). On or about Saturday, August 13, 1932, after the decree had been signed, the proctor for the respondent wrote a letter to Judge Knox stating that his attention had been called to two cases which he believed held that the relief, provided for by R. S. 4529 (46 U. S. Code, Sec. 596), was a penalty, and that it could not be recovered against the United States, and he requested a rehearing of the case (R., 151-152).

There is absolutely no evidence to show when this letter reached Judge Knox, whether it was before or after the entry of the decree on Monday, August 15, 1932, or to show that the Clerk of the Court knew anything of it. It appears from the evidence that the decree must have been sent to the Clerk to be duly entered and that he did so. Nowhere does it appear that the court ever notified the clerk not to enter the decree. There is nothing in the record to show that the Court took any notice of the application for a rehearing until on or about August 28, 1932, when it granted a rehearing of the suit (R., 155).

On or about February 10, 1933, the Court handed down a decision holding that the relief, provided for by R. S. 4529 (46 U. S. Code, Sec. 596), was a penalty, and that said relief could not be recovered against the respondent (R., 156-163).

The District Court in its decision did not pass upon the question as to whether or not, even if the relief, provided for by R. S. 4529 (46 U. S. Code, Sec. 596), were a penalty, the respondent, the United States, had waived any immunity it might have been entitled to as a sovereign by entering into commercial business in competition with private owners, and by and under the Suits in Admiralty Act of March 9, 1920, Chapter 95, Sections 1, 2 and 6, (U. S. Code, Title 46, Sections 741, 742, 746).

The decree was entered on or about March 9, 1933 (R., 164-165), and an order allowing an appeal from this decree was duly signed and filed March 16, 1933. On said date assignments of error were also duly filed (R., 169-179). On July 16, 1933, the United States Attorney moved for an order amending the decree filed March 9, 1933, by inserting a clause therein vacating and setting aside the decree entered August 15, 1932 (R., 181-187). The motion was opposed (R., 187-193), but was granted. An order amending the decree of March 9, 1933, by inserting a clause therein vacating the decree entered August 15, 1932, was entered on July 18, 1933 (R., 194-196).

On August 10, 1933, an appeal from the amended decree entered July 18, 1933 was allowed in the District Court, and new assignments of error were filed

by the libellant, the petitioner herein, which questioned, in addition to the issues previously raised, the power of the District Court to amend the decree of March 9, 1933, and to vacate the decree of August 15, 1932 by the amended decree of July 18, 1933 (R., 198-209).

C. THE PROCEEDINGS ON THE APPEAL.

The transcript of the record was duly certified by the Clerk of the United States District Court on October 13, 1933. The case was promptly docketed on or about October 13, 1933, (R., 215), without prepayment of costs, by virtue of the provisions of U. S. Code, Title 28, Section 837, under which petitioner now brings his application to this Court. A hearing was thereafter had in the United States Circuit Court of Appeals on February 14, 1934, and a decision was handed down on or about April 29, 1934 (R., 216-221). The decree of the United States Circuit Court of Appeals was entered May 7, 1934 (R., 221).

In its decision the Circuit Court of Appeals, although stating that in a number of cases, including the case of *Vincent v. United States*, 272 Fed. 889, which had been decided by the Circuit Court of Appeals for the Ninth Circuit, it had been held that the relief of two days pay for one, provided by R. S. 4529 (46 U. S. Code, Sec. 596), was not a penalty but was compensation or wages, held nevertheless that they would follow the decision in the case of *Missouri Pacific R. R. Co. v. Ault*, 256 U. S. 554. That case construed a statute of the State of Arkansas and held that the relief provided for by the Arkansas statute was a penalty and that it could not be recovered

against the respondent, the United States, which was operating a railroad in the State of Arkansas under a war measure. The Circuit Court of Appeals in the case at bar accordingly held that the relief, provided for by R. S. 4529 (46 U. S. Code, Sec. 596), was a penalty and not compensation or wages, and that said relief could not be recovered against the respondent, the United States (R., 216-221).

The District Court held that the libellant, the petitioner herein, could not recover for the additional one month's pay and the cost of transportation back to the United States, although he had been discharged in a foreign country on account of the violation of Section 2 of the Act of March 4, 1915, Chapter 155 (46 U. S. Code, Sec. 673) by the respondent, the United States, for the reason that the relief, provided for by Section 2 of the Act of March 4, 1915 (46 U. S. Code, Sec. 673), was exclusive (R., 144-146). The Circuit Court of Appeals did not pass upon the question of whether or not the relief under Section 673 was exclusive, in any way whatsoever, but held that the libellant, petitioner herein, was not entitled to the relief provided by R. S. 4529, (46 U. S. Code, Sec. 685), and based its decision upon the fact that the libellant, petitioner herein, had not been discharged by the American Consul at London. Whether by inference it might be said that the Circuit Court of Appeals decision meant or implied that the relief, provided for by Section 2 of the Act of March 4, 1915 (46 U. S. Code, Sec. 673), is not exclusive, and that if the petitioner herein had been discharged by the American Consul he would have been entitled to the relief, provided for by R. S. 4583 (46 U. S. Code, Sec. 685), does not ap-

pear, and that question is left open by the decision of the Circuit Court of Appeals, and should be decided by this court.

The Circuit Court of Appeals also held that when the libellant, the petitioner herein, left his vessel in London, without being discharged by the American Consul, he "deserted his ship," (R., 220) although it had been held by the District Court that he was entitled to his discharge, to leave his ship, and to receive the wages earned (R., 143). It had also been held by the United States Supreme Court that under those conditions he was not a deserter and was entitled to his discharge and to receive the wages earned and could bring an action therefor. See *O'Hara v. Luckenbach Steamship Co.*, 269 U. S. 364.

IV. Specification of Errors.

The errors assigned and intended to be argued have been outlined above in the petition (pp. 1-6), to which reference is respectfully made.

V. Argument.

POINT I.

Petitioner's wages were withheld "Without Sufficient Cause".

It was found by the District Court, in its opinion dated July 26, 1932 (R., 142-150) (3 Fed. Sup. 184), that the crew of the S. S. *American Shipper* had not been divided into equal watches, as required by Section

2 of the Act of March 4, 1915 (46 U. S. Code, Sec. 673), and that the libellant, the petitioner herein, was entitled to his discharge from said vessel at the Port of London upon his demand, and also to the wages earned (R., 143). It was also found that:

> • • • "The right of libellant to his pay, under the Luckenbach decision was so obvious that the delay in making payment of this item since the libel was filed, cannot be said to have come about from 'a sufficient cause'." (R., 150.)

The District Court, in its opinion dated February 10, 1933 (R., 156-163), did not in any way change or modify this finding. The respondent took no appeal from this finding. In fact, it took no appeal whatsoever, and said finding was not questioned in the decision of the Circuit Court of Appeals (R., 216-221).

POINT II.

The relief, provided for under the Seamen's Act of March 4, 1915, Chapter 153, Section 3, R. S. 4529, (46 U. S. Code, Sec. 596), is compensation or wages and not a penalty.

The relief of two days' pay for one, provided for under R. S. 4529 (46 U. S. Code, Sec. 596), is compensation or wages and not a penalty.

All the statutes providing for the relief of a seaman become and are a part of the contract with him when he signs shipping articles. The decision of the District Court and that of the Circuit Court of Appeals that said relief was a penalty is in conflict with the Fifth Amendment to the Constitution of the United

States, with the statute itself, with the decisions of this Court, and with the decisions of the United States Circuit Court of Appeals for the Ninth Circuit, the United States District Court for the districts of Maryland and South Carolina, as well as the courts of last resort in New York and Massachusetts.

R. S. 4529, Act of March 4, 1915, Chapter 153, Section 3 (46 U. S. Code, Sec. 596) provides:

> "*Time for payment.* The master or owner of any vessel making coasting voyages shall pay to every seaman his wages within two days after the termination of the agreement under which he was shipped, or at the time such seaman is discharged, whichever first happens; and in case of vessels making foreign voyages, or from a port on the Atlantic to a port on the Pacific, or vice versa, within twenty-four hours after the cargo has been discharged, or within four days after the seaman has been discharged, whichever first happens; and in all cases the seaman shall be entitled to be paid at the time of his discharge on account of wages a sum equal to one-third part of the balance due him. Every master or owner who refuses or neglects to make payment in the manner hereinbefore mentioned without sufficient cause shall pay to the seaman a sum equal to two days' pay for each and every day during which payment is delayed beyond the respective periods, which sum shall be recoverable as wages in any claim made before the court; but this section shall not apply to masters or owners of any vessel the seamen of which are entitled to share in the profits of the cruise or voyage."

The Circuit Court of Appeals in its decision admits that the relief, provided for in the statute in question (R. S. 4259; 46 U. S. Code, Section 596), has been held to be compensation or wages, and judgment granted

and entered, in an action against the United States (*Vincent v. United States*, 272 Fed. 889), and that in a number of other cases, where the question has been raised as to whether or not the relief is a penalty, it has been decided that it was compensation or wages and not a penalty (R., 219). No reported case had held such relief to be a penalty, except for dicta in a District Court case, *Corrigan v. United States*, 298 Fed. 610.

In the case of *Vincent v. United States*, 272 Fed. 889, judgment was allowed against the respondent, the United States (who is the respondent in this case), for the relief provided for in said statute, 46 U. S. Code, Section 596. The Vincent case was decided by the United States Circuit Court of Appeals for the Ninth Circuit. The Circuit Court of Appeals in its opinion in the present case states that in the Vincent case the question of whether or not the relief, provided for under said statute, was compensation or wages, was not discussed. It must be presumed, however, that in considering the Vincent case the Court had in mind all questions of facts and law involved and considered the same.

United States v. Texas, 143 U. S. 621, 642.
Danks v. Gordon, 22 Fed. 821, 823.

Not only this, but in subsequent cases before the same Court, the United States Circuit Court of Appeals for the Ninth Circuit, it was held that the relief provided for in said statute did not constitute a penalty but was for compensation or wages earned.

Gerber v. Spencer, 278 Fed. 886.

In the case of *Buckley v. Oceanic Steamship Co.*, (5 Fed. (2) 545, C. C. A., 9th Circuit), the same court and two of the same judges, who had decided the Vincent case, the opinion of Hunt, J., being concurred in by Gilbert and Rudkin, JJ., said (p. 546):

> "• • • The nature of the statute (R. S. 4529), whether it is remedial or penal, has been considered *by this and other courts,* which have held that sums recoverable under its provisions are treated as wages—compensation to seamen, rather than the punishment of the master. *Gerber vs. Spencer,* (C. C. A.) 278 Fed. 886; *Cox v. Lykes Bros.,* 237 N. Y. 376, 143 N. E. 226" (Italics ours).

And also (p. 546):

> "In as much as the claim for the two days' pay under Sec. 4529, *supra,* is for extra wages as incidental to the wages proper, it stands upon no different basis than does the claim for wages proper."

It has also been held in a number of other cases that said relief provides for compensation or wages and not a penalty.

The Fort Gaines, 18 Fed. (2) 413;
The Chester, 25 Fed. (2) 908;
The Trader, 17 Fed. (2) 623.

This Court said, in the case of *Collie et al. v. Fergussen, et al.,* 281 U. S. 52 (p. 54):

> "The claim for double wages which, when valid, is by the terms of the statute '*recoverable as wages,*' has been held to be embraced in the seaman's lien for wages with priority over other liens, and governed by the procedure applicable to suits for the recovery of seamen's wages • • •" Citing cases. (Italics ours.)

The same question came before the Circuit Court of Appeals of the State of New York in the case of *Cox*

v. Lykes Bros., Defendant, and *United States Shipping Board Emergency Fleet Corp.*, Defendant-Respondent, 237 N. Y. 376.

The complaint against the defendant Lykes Brothers had been dismissed (204 A. D. 442), and the defendant *United States Shipping Board Emergency Fleet Corporation was the sole respondent* in the Court of Appeals. The opinion therein was written by Mr. Justice Cardoza, now of this Court. As was stated in said opinion, the vessel in question was registered in the name of the United States of America and was operated by the United States Shipping Board Emergency Fleet Corporation through Lykes Brothers as agents. The question raised on this appeal was whether or not R. S. 4529 (46 U. S. Code, Sec. 596) provided for compensation or wages, or for a penalty, and whether an action therefor could be brought in a state court. The Court held that it provided for wages or compensation and did not provide for a penalty. On page 379 the Court said:

> "The Appellate Division found the present suit to be one for a penalty or forfeiture within the meaning of this statute. We do not so regard it. Congress has expressly said that the extra compensation, when due, 'shall be recoverable as wages.' This would seem decisive, without more, that in determining the bounds of jurisdiction, it is not to be classified as a penalty. There was no thought that the state courts, which have undoubted jurisdiction to give judgment for wages in the strict sense, should be shorn of jurisdiction to give judgment for the statutory incidents. This conclusion is fortified when we search for the purpose of the statute. The purpose, or at least the predominant one, was not punishment of the master or owner, but compensation to the seaman. Delay means loss of opportunity to ship upon an-

other vessel. It means hardship during the term of waiting, the sufferer, often improvident, and stranded far from home. 'In all fairness he should recover more than the amount due him for wages earned' *(Calvin v. Huntley,* 178 Mass. 29, 32). How much this extra amount should be would be often a troublesome question, if it were left open in every case. '*Hence it might be deemed advisable to have this indefinite element made definite by a general law with reference to which the parties may conclusively be presumed to have contracted, and which, therefore, should be taken to the law of the contract'* (Calvin v. Huntley, *supra; Gerber v. Spencer,* 278 Fed. Rep. 887; *Covert v. British Brig Wexford,* 3 Fed. Rep. 577, 578, 579). The case cited from Massachusetts is authority for the ruling that an action for extra wages under section 4527 of the United States Revised Statutes, which does not differ in essentials from section 4529, may be maintained in the state courts, and is not an action for a penalty * * *'' (Italics ours).

The same construction of a similar statute, R. S. 4527 (46 U. S. Code, Sec. 594), was given in the case of *Calvin v. Huntley,* 178 Mass. 29, 32, in which decision Mr. Justice Holmes, later a member of this Court, concurred.

An action for extra wages, under R. S. 4527 (46 U. S. Code, Sec. 594), does not differ in essentials from R. S. 4529 (46 U. S. Code, Sec. 596), *(Cox v. Lykes Bros.,* 237 N. Y. 376, 379).

In the case of *United States Steel Products Co. v. Adams, (The Steel Trader),* 275 U. S. 388, which was brought under R. S. 4527, it was said (p. 391):

> "The word compensation, in Sec. 4527, distinctly indicates that payment of a sum equal to one

month's wages was intended to constitute the remedy for invasion of the seaman's rights through breach of his contract of employment in the circumstances specified. 'Damages consist in compensation for loss sustained * * * By the general system of our law, for every invasion of right there is a remedy, and *that remedy is compensation.* This compensation is furnished in the damages which are awarded.' Sedgwick's Damages, 9th Edition, Vol. I, p. 24. See also *Bauman v. Ross,* 167 U. S. 548. The provision that such sum may be recovered 'as if it were wages duly earned' permits the seaman to enforce payment by the special and summary methods provided for collecting his ordinary wages.

"In *Calvin v. Huntley,* (1901) 178 Mass. 29, 32, we think the Supreme Court of Massachusetts properly interpreted Sec. 4527, and in respect of it rightly said:

" 'It speaks not of punishment but of compensation, its object is to protect the seamen from loss rather than to punish the master for discharging him. *The remedy is given to the seamen alone, and its plain purpose is to furnish a clear and well defined rule of damages as between him and the master for a breach of contract in which the seaman and the master or owner are the only persons interested* * * * Nor does the rule of damages seem unreasonable. The shipping contract calls upon the seaman to go to various places, sometimes far from home, and it may be, for instance as in this case was the actual fact, that he may be discharged in a port distant from that where he signed the articles, or where he can not immediately secure any other employment on board ship or elsewhere, and that in all fairness he should recover more than the amount due him for wages earned. Hence it might be deemed advisable to have this indefinite element made definite by a general law with reference to which the parties may conclusively be presumed to have contracted, and which therefore should be taken to be the law of the contract. *The object of the stat-*

> *ute is not to punish but to provide a reasonable rule of compensation for a breach of contract.* We think the statute not penal but remedial * * *'" (Italics ours).

In practically all cases, where the question of the construction of R. S. 4529 (46 U. S. Code, Sec. 596) or R. S. 4527 (46 U. S. Code, Sec. 594), has come in question in actions pending in the federal courts and courts of various states, it has been held that the relief provided for in said sections constituted compensation or wages and not a penalty and was part of the contract.

In all cases where the relief under these statutes has been refused it has been on the ground that the failure or refusal to pay the wages due was with "sufficient cause."

The Circuit Court of Appeals in its opinion (R., 219) admits that in the cases in which the question has been raised of whether or not the relief, provided for by R. S. 4529 (46 U. S. Code, Sec. 596), is a penalty, or wages or compensation, it has been held that it is wages or compensation and not a penalty.

The Circuit Court of Appeals bases its opinion that the relief, provided for by said statute, is a penalty and not wages or compensation, on the case of *Missouri Pacific R. R. Co. v. Ault,* 256 U. S. 554. That case involved the construction of a statute of the State of Arkansas, which stated specifically that the relief was a penalty, and also involved what is known as the Federal Control Act.

In the Ault case *(supra),* the President had taken possession of the Missouri Pacific Railroad pursuant

to the Proclamation of December 26, 1917 (40 Stat. 1733), under the Act of August 29, 1916 (C. 418, 39 Stat. 619, 645). In the last named statute (39 Stat. 645), it was provided:

> "The President, in time of war, is empowered, through the Secretary of War, to take possession and assume control of any system or systems of transportation, or any part thereof, and *to utilize* the same, *to the exclusion as far as may be necessary of all other traffic thereon, for the transfer or transportation of troops, war material and equipment,* or for such other purposes connected with the emergency as may be needful or desirable." (Italics ours.)

In said case the Court said (p. 559):

> "The courts were to go on entertaining suits and entering judgments under existing law, but the property in the hands of the President *for war purposes* was not to be disturbed." (Italics ours.)

The railroad was being operated as a *war measure* under the Federal Control Act (39 Stat. 645) *for the transportation and transfer of troops, war material and such other purposes as might be connected with the emergency as might be useful and desirable, to the exclusion of other traffic.* As is said in the Ault case (p. 559):

> "* * * but the property in the hands of the President *for war purposes* was not to be disturbed." (Italics ours.)

In the present case, *McCrea v. United States,* the government was operating the merchant vessel, S. S. *American Shipper* in competition with private owners, and under the provisions of the Suits in Admiralty Act.

Judge Cardoza clearly distinguished the statute involved in the Ault case, and R. S. 4529 (46 U. S. Code, Sec. 596), in his opinion in *Cox v. Lykes Bros. et al.*, 237 N. Y. 376, saying (p. 380):

> "We are to remember that the same provision may be penal as to the offender and remedial as to the sufferer * * * The nature of the problem will determine whether we are to take one viewpoint or the other. *From the viewpoint of the government (in the Ault case) the court found this provision predominantly penal as well it might, not only because the statute (of Arkansas) so declared, but also because of the differing situation of seamen on the one hand and railroad workers on the other. Here (referring to the Cox v. Lykes case), Congress imposing a liability for the benefit of seamen, has put it on the same plane as a liability for wages, and has said that the two shall be enforcible together.*" (Italics and words in parentheses ours.)

Vincent v. United States, 272 Fed. 889.

Gerber v. Spencer et al., 278 Fed. 886.

Buckley v. Oceanic Steamship Co., 5 Fed. (2) 545.

The distinction between the situation where the United States is engaged in private business (as in the McCrea case, and in the cases just cited), and that where it is engaged in a governmental capacity as a war measure (as in *Missouri Pacific R. R. Co. v. Ault, supra)*, is set out in the case of *Ballaine v. Alaska Northern Ry. Co.*, (259 Fed. 183, at p. 185):

> "The act of March 12, 1914, ch. 37, heretofore cited, which authorizes the President to locate, construct and operate railroads in Alaska, expressly provides that the Alaska Railroad is *for the settlement of public lands and the transportation of coal for the Army and Navy, for the transportation of troops, arms, munitions of war, the mails,*

> *and for other governmental and public uses,* and to transport passengers and property. The act (Section 21) also confers authority upon the President, through such agents as he may appoint or employ, to do all necessary acts, in addition to those specially authorized, to enable him to accomplish the purposes of the Act * * * Taking all these provisions together they plainly show, that the United States * * * acted in its sovereign capacity, and in exercising entire control, possession, ownership and management, has merely employed the corporate organization as an agency through which to exercise the purposes of the statute." (Italics ours.)

Referring to the case of *Salas v. United States,* (234 Fed. 832), which was similar to the case at bar, the court said (p. 185):

> "The Court of Appeals (in the Salas case) was of the opinion that the United States had entered into commercial business in the premises and was to be treated like any other corporation * * *"

In the case of *Salas v. United States,* 234 Fed. 842, C. C. A., 2d Circuit, Salas was charged with conspiracy to defraud the United States. The Panama Railroad Co. was a New York corporation, and was an agency of the United States, all the stock being held by the United States, and was operated by the War Department. It is said (p 844):

> "When the United States enters into commercial business it abandons its sovereign capacity and is to be treated like any other corporation. *Bank of United States v. Planters Bank,* 9 Wheat. 904, 6 L. Ed. 244. Although it absolutely owns the Panama Railroad Company and is the only person profiting or losing by its activities, still the Railroad Company sues and is sued just like any other corporation, in its own name."

POINT III.

The respondent, the United States, waived any immunity to which it was entitled by entering into commercial business in competition with private owners and by the Suits in Admiralty Act of March 9, 1920, Chapter 95, Sections 1, 2, 6, (46 U. S. Code, Secs. 741, 742, 746).

One of the peculiar things in this action is that both the District Court and the Circuit Court of Appeals, in their decisions, neglected or failed to consider the vital point that, even if the relief, provided for by R. S. 4529 (46 U. S. Code, Sec. 596), *were a penalty, and not wages or compensation, the respondent, the United States, divested itself of all sovereign character and waived immunity, both by entering into commercial business in competition with private owners, and by and under the Suits in Admiralty Act of March 9, 1920, Chapter 95,* Secs. 1, 2 & 6, (46 U. S. Code, Secs. 741, 742, 746).

Even before the Suits in Admiralty Act was passed it had been held by this Court, in the case of *The Lake Monroe,* 250 U. S. 246, that the vessel, *The Lake Monroe,* was subject to libel even though it was claimed that said vessel was exempt from seizure on the ground that it was the property of the United States. In said action the libellant claimed that the vessel was not exempt from seizure under Section 9 of the Shipping Board Act of September 7, 1916, which read in part (46 U. S. Code, Sec. 808):

> Section 808 * * * Such vessels while employed solely as merchant vessels shall be subject to all laws, regulations, and liabilities governing mer-

chant vessels, whether the United States be interested therein as owner, in whole or in part, or hold any mortgage lien, or other interest therein.

The court so held, saying (pp. 254, 255, 256):

"The provisions of Section 9 of the Act of Sept. 7, 1916, that vessels purchased, chartered or leased from the Shipping Board, while employed solely as merchant vessels, should be subject to all laws, regulations, and liabilities governing merchant vessels, whether the United States were interested therein as owner or otherwise, was a most material restriction, deemed by Congress to be essential to subject them to the same duties and liabilities as privately owned merchant vessels with which they competed * * *"

"Her service at the time was purely commercial, and she was subject by the terms of the act to the ordinary liability of a merchant vessel, notwithstanding the indirect interest of the Government in the outcome of her voyage * * * We deem it clear, also, that among the liabilities designated by the section is the liability of a merchant vessel to be subjected to judicial process in admiralty for the consequences of a collision."

In order to avoid the inconvenience and delay of the seizure of vessels owned by the United States, or in which it had an interest, the Suits in Admiralty Act of March 9, 1920, was passed. In this act, all liabilities of private owners were assumed by the United States, but the vessels owned by it or its corporations were exempt from libel.

Eastern Transportation Co. v. United States, 272 U. S. 675.

That it was the intent of Congress that the United States should waive all immunity, and should stand in the same position as the owners of privately owned vessels, clearly appears.

In or about the year 1932, an amendment to Section 5 of the Seamen's Act was before Congress. The amendment was for the purpose of allowing actions to be continued against the United States or the United States Shipping Board Merchant Fleet Corporation, formerly known as the United States Shipping Board Emergency Fleet Corporation. On or about June 6, 1932, the Senate Committee on the Judiciary submitted its report, Calendar No. 821, Report No. 771, 72nd Congress, which contains the following statements:

"TO AMEND SECTION 5 OF THE SUITS IN ADMIRALTY ACT"

"Mr. Austin, from the Committee on the Judiciary, submitted the following

"REPORT

"(To accompany H. R. 7238)

"* * * When the United States Government began to engage in the operation of merchant vessels, it sought in every way possible to compete for freights with the merchant vessels of private carriers of similar freight, most of which were of foreign nationality. In its competitive efforts to get business, it found itself handicapped because, as a sovereign Government, it could not be sued except by special act of Congress in each case, whereas a private carrier was readily amenable to the process of the courts in the event of death or injury to seamen or of any damage caused by the vessel or its operators to the cargoes or passengers on board. This led to the use of vessels of private carriers in preference to those of the Government.

"In order to remove that competitive handicap, the United States Shipping Board Emergency Fleet Corporation requested Congress to permit seamen, cargo shippers, and passengers on Fleet Corporation vessels to sue the United States in the same manner as if the seamen were employed by, or the cargo were shipped, and the passenger sailed on a privately owned vessel * * *"

In the report, No. ~~1912~~ 1012, 72nd Congress, 1st Session, submitted by the Committee on the Judiciary of the House of Representatives the intent of the Suits in Admiralty Act also clearly appears, as follows:

"AMEND THE SUITS IN ADMIRALTY ACT"

"Mr. Montague, from the Committee on the Judiciary, submitted the following

"REPORT

"(To accompany H. R. 7238)

"The Committee on the Judiciary, to whom was referred the bill H. R. 7238, after consideration, reports the same favorably with an amendment and recommends that the bill as amended do pass.

"The committee amendment is as follows:

"The chief purposes which Congress sought to accomplish by the passage of the admiralty act were:

"1. To free the United States Government from the embarrassment and necessity of putting up bonds in those cases where United States merchant vessels were seized and suits commenced *in rem*.

"2. To enable the merchant vessels of the United States Fleet Corporation to compete for freights on an equal footing with other American and foreign merchant ships.

"*This was done by abandoning the immunity which the United States enjoyed from suits in personam against the Fleet Corporation for such acts as a private carrier could be sued for in the courts of this country.*

"In this connection, Congress first legislated on the subject in the shipping act of 1916 (39 Stat. 728, c. 451) of which section 9 provides:

"Such vessels while employed solely as merchant vessels shall be subject to all laws, regulations, and liabilities governing merchant vessels whether the United States be interested therein as owner, in whole or in part, or hold any mortgage, lien or other interest therein." (Italics ours.)

The Suits in Admiralty Act (March 9, 1920, c. 95, Secs. 1, 2, 6; 41 Stat. 525, 526, 527; 46 U. S. Code, Secs. 741, 742, 746) provides as follows:

> Section 741. Exemption of United States vessels and cargoes from arrest or seizure.—No vessel owned by the United States or by any corporation in which the United States or its representatives shall own the entire outstanding capital stock or in the possession of the United States or of such corporation or operated by or for the United States or such corporation, and no cargo owned or possessed by the United States or by such corporation, shall, in view of the provision herein made for a libel *in personam*, be subject to arrest or seizure by judicial process in the United States or its possessions: *Provided*, That this chapter shall not apply to the Panama Railroad Company.
>
> Section 742. Libel *in personam*. In cases where if such vessel were privately owned or operated, or if such cargo were privately owned and possessed, a proceeding in admiralty could be maintained at the time of the commencement of the action herein provided for, a libel *in personam* may be brought against the United States or against such corporation, as the case may be, provided that such vessel is employed as a merchant vessel or is a tugboat operated by such corporation * * *
>
> Section 746. Exemptions and limitations of liability. The United States or such corporation shall be entitled to the benefits of all exemptions and of all limitations of liability accorded by law to the owners, charterers, operators, or agents of vessels.

In the *Matter of Snug Harbor*, 283 Fed. 1015, where the question of the Suits in Admiralty Act was raised, it is said (p. 1018):

> "* * * So it would seem that Congress, in the passage of the Act of March 9, 1920, intended to waive its claim of immunity, and place itself upon a parity with other ship owners engaged in similar trade and traffic; *to take upon itself the same obligation*

that by law it imposes upon others in like business * * * *Not only therefore does the express language of the act, but equally the failure to limit its terms, lead to the conclusion of an abandonment of immunity,* under the circumstances obtaining in the instant case." (Italics ours.)

In the same case, under the title of *Eastern Transportation Co. v. United States,* 272 U. S. 675, this Court said (pp. 687, 688):

"It is first objected to the recovery here that it was not intended by the Suits in Admiralty Act to subject the United States itself to prosecution for a *crime* which it denounces in its legislation. We need not be troubled by this objection, because there is no attempt here to prosecute the United States or any of its agents criminally. The declaration that the leaving of a wreck in a navigable channel in a place dangerous to passing steamers without notice of the danger and without immediate removal is unlawful, makes such omission a maritime tort, which, if merchant vessels of the United States are to respond in tort, may be recovered for in its admiralty courts against the United States without anomaly. *The Fahy,* 153 Fed. 866; *The Macy,* 170 Fed. 930; *People's Coal Company,* 181 Fed. 609, 188 Fed. 892. Under the Tucker Act and the general jurisdiction of the Court of Claims, of course, the United States is made liable only upon a contract express or implied, and not for a tort; *but its liability provided for in the Suits in Admiralty Act can not be limited to contracts any more than the liability of its merchant vessels under the Shipping Act of 1916 could be so limited. The Lake Monroe,* 250 U. S. 246." (Italics ours.)

Eastern Transportation Co. v. United States, 29 Fed. (2) 588; *United Fruit Co. v. United States Shipping Board Merchant Fleet Corp.,* 42 Fed. (2) 222; *Grace v. United States Shipping Board,* 53 Fed. (2) 272.

The Act of March 9, 1920, Chapter 93, Section 6 (46 U. S. Code, Sec. 746) provides:

> "The United States or such corporations shall be entitled to the benefits of all exemptions and of all limitations of liability accorded by law to the owners, charterers, operators or agents of vessels."

The United States, having taken away the right of the libellant, the petitioner herein, to libel the vessel, the S. S. *American Shipper,* and having accepted all the provisions of the Suits in Admiralty Act and all the exemptions and limitations of liability provided thereunder, must also assume all liabilities that would be assumed by or imposed upon private owners.

Eastern Transportation Co. v. United States, 272 U. S. 675, 690.

In the cases of *Lynch v. United States and Wilner v. United States,* recently decided by this Court, June 4, 1934, (78 U. S. Sup. Ct. Law Edition, p. 997), suit was brought on what may be referred to as two war insurance policies. It was contended on behalf of the respondent, the United States, that Section 17 of the Economy Act repealed "all laws granting or pertaining to yearly renewal term insurance." This Court held that the United States itself could not abrogate outstanding rights. On page 1001 it is said:

> "The Fifth Amendment demands that property be not taken without just compensation. Valid contracts are property, whether the obligor be a private individual, a municipality, a state or the United States. Rights against the United States arising out of a contract with it are protected by the Fifth Amendment. *United States v. Central Pacific R. R. Co.,* 118 U. S. 235, 238; *United States v. Northern Pacific R. R. Co.,* 256 U. S. 51, 64, 67.

> When the United States enters into contract relations its rights and duties therein are governed generally by the laws applicable to contracts between private individuals."

The United States was clearly in business in competition with private concerns and was bound by its contract with the libellant McCrea, and had lost any immunity it might have had as a sovereign. Any other construction would constitute an unfair discrimination against seamen employed on merchant vessels owned by the United States and would result in taking their property without just compensation, which is prohibited by the due process clause of the Fifth Amendment to the Constitution of the United States.

In the case of *Ohio v. Helvering*, decided May 28, 1934, (78 U. S. Sup. Ct. Law Edition, p. 911), the Court said (p. 912):

> "Whenever a state engages in a business of a private nature it exercises non-governmental functions, and the business, though conducted by the State, is not immune from the exercise of the power of taxation which the Constitution vested in Congress.
>
> "If a state chooses to go into the business of buying and selling commodities, its right to do so may be conceded so far as the federal constitution is concerned; but the exercise of the right is not the performance of a governmental function, and must find its support on some authority apart from the police power.
>
> "When a state enters the market place seeking customers it diverts itself of its *quasi* sovereignty *pro tanto*, and takes on the character of a trader, so far, at least, as the taxing power of the government is concerned."

In *Georgia v. Chattanooga*, 264 U. S. 472, the City of Chattanooga sought to condemn lands owned by the State of Georgia. The lands were used by Georgia for railway purposes. Georgia sought to enjoin the condemnation proceedings. On page 481 it is said:

> "The sovereignty of Georgia was not extended into Tennessee. Its enterprise in Tennessee is a private undertaking. It occupies the same position there as does a private corporation authorized to own and operate a railroad; and, as to that property, it cannot claim sovereign privilege or immunity. *Bank of United States v. Planters Bank*, 9 Wheat. 904, 907; *Bank of Kentucky v. Wister*, 1 Pet., 318, 323; *Louisville, C. and C. R. R. v. Letson*, 2 How. 497, 550; *South Carolina v. United States*, 199 U. S. 437, 463."

On page 482 it is said:

> "Having divested itself, (the State of Georgia), of its sovereign character, and having taken on the character of those engaged in the railroad business in Tennessee *(Bank of U. S. v. Planters Bank, supra)*, its property there is as liable to condemnation as that of others, and it has, and is limited to the same remedies as are other owners of property in Tennessee."

The United States had been engaged in private business operating vessels on the high seas as merchant vessels in competition with private owners. All merchant vessels were subject to libel, and it has been held by this Court that vessels owned by the United States, whether registered in its name or by some board or corporation in its behalf, were subject to libel the same as that of any other operator or shipowner.

The Lake Monroe, 250 U. S. 246.

Desiring to do away with the inconvenience of having merchant vessels owned by it subject to libel, the Suits in Admiralty Act was passed in which the United States agreed and contracted that the vessels should not be libelled but that in place thereof suit could be brought against the United States with the same force and effect as though the against a private owner. These provisions were embraced in the contract with the seamen and the rights thereunder could not be abrogated by the United States itself.

Lynch v. United States, 78 U. S. Sup. Ct., Law Ed. 997.

Yet, in the present case, *McCrea v. United States,* the Circuit Court of Appeals tries to do something which Congress could not do. That is, abrogate the rights McCrea had under his contract with the United States, including those rights arising from the Suits in Admiralty Act. It will be noted that in the opinions of the District Court and the Circuit Court of Appeals nothing is said about the Suits in Admiralty Act.

POINT IV.

The libellant, petitioner herein, upon his discharge at the foreign port of London by reason of the violation by the respondent, the United States, of U. S. Code, Title 46, Section 673, (Section 2 of the Seamen's Act of March 4, 1915), was entitled not only to his wages earned but also to one month's additional pay and to transportation back to the United States, under the provisions of R. S. 4583 (46 U. S. Code 685).

R. S. 4583 (Dec. 21, 1898, c. 28, sec. 18; 30 Stat. 760; 46 U. S. Code, Sec. 685) provides:

> "Section 685. Wages on justifiable complaint of seaman.—Whenever on the discharge of a seaman in a foreign country by a consular officer on his complaint that the voyage is continued contrary to agreement, or that the vessel is badly provisioned or unseaworthy, or against the officers for cruel treatment, it shall be the duty of the consul or consular agent to institute a proper inquiry into the matter, and, upon his being satisfied of the truth and justice of such complaint, he shall require the master to pay to such seaman one month's wages over and above the wages due at the time of discharge, and to provide him with adequate employment on board some other vessel, or provide him with a passage on board some other vessel bound to the port from which he was originally shipped, or to the most convenient port of entry in the United States, or to a port agreed to by the seaman."

The District Court found that the libellant, petitioner herein, was not entitled to the relief provided for by R. S. 4583 (46 U. S. Code, Sec. 685) when he was discharged at the port of London by reason of the violation by the respondent, the United States, of Section 2 of the Seamen's Act of March 4, 1915 (46 U. S. Code, Sec. 673), for the reason that the relief, provided for by said Section 2 of the Seamen's Act of March 4, 1915 (46 U. S. Code, Sec. 673), was exclusive (R., 144-146).

The Circuit Court of Appeals in its decision, however (R., 220-221), did not pass upon the question as to whether or not the relief, provided for by Section 2 of the Seamen's Act of March 4, 1915 (46 U. S. Code, Sec. 673), was exclusive, but based its decision entirely upon the point that the libellant, petitioner herein, had not been discharged by the United States Consul.

While it might be inferred from the decision of the Circuit Court of Appeals that if the libellant, petitioner herein, had been discharged by the United States Consul at London, he would have been entitled to the relief provided for by R. S. 4583 (46 U. S. Code, Sec. 685), there is no positive decision to that effect, and the decision of the District Court that the relief, provided for by Section 2 of the Seamen's Act of March 4, 1915 (46 U.S. Code, Sec. 673), is exclusive, has not been overruled by the Circuit Court of Appeals decision, and that question should be passed upon by this honorable court.

The code of laws of the United States, Title 46, Sections 541 to 752 contains the disciplinary laws and the laws for the protection of seamen. Under their definition, no one comes under this law until he has entered into an agreement by which he becomes a seaman. Having entered into such an agreement, all the laws dealing with seamen in their relation to the ship and the country become applicable.

A seaman discharged in a foreign port might be stranded far from home, as in this case without even his clothes, in midwinter, and all the admiralty statutes are for his protection.

As is said in the case of *Howick Hall,* (10 Fed. (2) 162, at page 163):

> "Sailors are wards of the admiralty, and the courts jealously protect their rights."
>
> *The Steel Trader,* 10 Fed. (2) 248, 249.

All the statutes in relation to seamen are embraced in and become a part of the contract between the seamen and the shipowners.

In *United States Steel Products Co. v. Adams, (The Steel Trader)* (275 U. S. 388), the court, citing *Calvin v. Huntley,* (178 Mass. 29, 32), said (p. 392):

> "The remedy is given to the seamen alone, and its plain purpose is to furnish a clear and well defined rule of damages as between him and the master *for a breach of contract* in which the seamen and the master and owner are the only persons interested * * *"
>
> "The object of the statute is not to punish but to provide a reasonable *rule of compensation for a breach of contract.*" (Italics ours.)

The British Brig Wexford, 3 Fed. 577, 579.

Cox v. Lykes Bros., 237 N. Y. 376, 378.

The Steel Trader, 10 Fed. (2) 248, 252.

Calvin v. Huntley, 178 Mass. 29, 32.

There is no question but that when the respondent, the United States, violated Section 2 of the Seamen's Act of March 4, 1915 (46 U. S. Code, Sec. 673), the voyage was continued contrary to agreement, and the vessel rendered unseaworthy.

O'Hara v. Luckenbach S.S. Co., 269 U. S. 364, 367, 368.

In Re Meyer, 74 Fed. 881, 885.

In Re Pacific Mail S.S. Co., 130 Fed. 76.

Flint and P. M. R. v. Marine Insurance Co., 71 Fed. 210.

The Rolph, 293 Fed. 269.

Northern Com. Co. v. Lindblom, 162 Fed. 250, 254.

The S. S. *American Shipper* being unseaworthy, the libellant was not only entitled to his discharge and the wages due, but, having been discharged in a for-

eign port, he was also entitled to one month's additional pay and transportation back to the port of New York.

The Donna Lane, 299 Fed. 977.

It will be noted that Section 2 of the Seamen's Act of March 4, 1915 (46 U. S. Code, Sec. 673) does not state that the relief therein provided for is the sole relief.

In the case of the Snug Harbor, 283 Fed. 1015, the court said (p. 1018):

> "* * * but equally *the failure to limit its terms,* leads us to the conclusion of an abandonment of immunity."

The relief provided by Section 2 of the Act of March 4, 1915 (46 U. S. Code, Sec. 673), not being limited by its terms, it clearly appears that the libellant was entitled to the benefit of all statutes enacted for his protection, including R. S. 4583 (46 U. S. Code, Sec. 685).

Section 2 of the Act of March 4, 1915 (46 U. S. Code, Sec. 673) applies to a case where a seaman might be discharged either in the United States or in a foreign country. In the ports of the United States he is in his home country. If discharged in foreign ports, a seaman, often improvident, is stranded far from home, and the relief provided by R. S. 4583, (46 U. S. Code 685) is for his protection.

The Circuit Court of Appeals bases its decision that the libellant, petitioner herein, is not entitled to the relief, provided for by R. S. 4583 (46 U. S. Code, Sec. 685), on the ground that said petitioner was not dis-

charged by the United States Consul at London and that he

> "* * * deserted his ship when he failed to get favorable action from the consul in London * * *" (R., 220).

It was found by the District Court that the libellant, petitioner herein, was discharged by reason of the violation by the respondent, the United States, of Section 2 of the Seamen's Act of March 4, 1915 (46 U. S. Code, Sec. 673), and he was entitled to his wages earned. He did not desert his ship and he was entitled to bring this action.

Strathearn S. S. Co. v. Dillon, 256 Fed. 631; 252 U. S. 348.
Thompson, etc. v. Lucas, et al., 252 U. S. 358.
O'Hara v. Luckenbach S. S. Co., 269 U. S. 364.

The libellant, petitioner herein, made diligent efforts to have the United States Consul at London approve his discharge. Although the attention of the consul was called particularly to the decision of this court in the O'Hara case, *supra*, he refused to approve the discharge of the petitioner. This appears from the testimony of the respondent's own witnesses (R., 99-107, 115-118, 120).

In his deposition, offered in evidence by the respondent, the consul admitted that the libellant, petitioner herein, mentioned the case of *O'Hara v. Luckenbach S. S. Co., supra*, but stated that he, the consul, was not concerned with the decision of the United States Supreme Court in said case (R., 107, 118, 119, 124, 125). Yet the Circuit Court of Appeals in the case at bar has held in effect that the arbitrary act of

the consul, in refusing to discharge or to approve the discharge of the libellant, petitioner herein, deprived the libellant, petitioner herein, of all right to bring any action or proceeding in the courts of the United States to secure the relief provided for by R. S. 4583 (U. S. Code, Sec. 685). In other words, that the opinion of the United States Consul was superior to the opinion of the United States Supreme Court. If the decision of the Circuit Court of Appeals in this case (*McCrea v. United States*) should stand, it would mean that any law of the United States and any decision of the United States Supreme Court could be absolutely nullified by any consular officer of no matter how little minor importance. This would often mean, as in the instant case, that a seaman would be deprived of property without due process of law and without compensation.

U. S. Code, Title 46, Section 641, provides that a seaman, engaged on a voyage from any port of the United States to a foreign port ~~and~~ who is discharged in the United States, must be discharged in the presence of a duly authorized shipping commissioner. This court, however, has held that if U. S. Code, Title 46, Section 673, is violated, a seaman is not a deserter if he leaves his ship without the consent of, or any other act on the part of, the captain or shipping officer, and can bring an action in the United States Courts to recover the wages due.

O'Hara v. Luckenbach S. S. Co., 269 U. S. 364.
Strathearn S. S. Co. v. Dillon, 256 Fed. 631; 252 U. S. 348.
Thompson v. Lucas, 252 U. S. 358.

If it were necessary to secure the approval of the United States Consul to the discharge of the libellant, such approval was necessary solely for the protection of the captain, and it was his duty to secure it. See Section 4576 of Revised Statutes, as amended by Section 3 of the Act of March 3, 1897.

There was no question for the consul to decide. He admits that he was satisfied that the law had been violated (R., 124-125). The only question he might have passed upon was whether or not he should approve the discharge of the libellant for the protection of the captain. This he did not do. Even where a question of fact is submitted to a consul, his holding is not conclusive, but in this case there is no question of fact. The consul admits that he knew there was no question of the fact, and that he also knew of the decisions of the United States Supreme Court, which had clearly decided the law (R., 124-125). This being so, the libellant, petitioner herein, clearly should be allowed to present his claim in court for the relief provided for by R. S. 4583 (U. S. Code, Title 46, Sec. 685).

The Donna Lane, 299 Fed. 977, 982.

In *McAvey v. U. S. Emergency Fleet Corp.*, 15 Fed. (2) 405, the court said (p. 407):

> "These are questions (reasons for discharge of seamen) for the master to decide; he is the one who makes the discharge. The consul does not 'cause' a seaman to be discharged, as the declaration alleges, in a case like the present. It is evidently based upon a misunderstanding of the law. When a *master* discharges a seaman in a foreign port, in order to protect himself under Revised Statutes, Section 4576, *supra*, he must secure the consent of the consul to his action" (Italics and matter in parenthesis ours).

The decision of the District Court and the decision of the Circuit Court of Appeals in relation to the sections of the Seamen's Act involved in this case except Section 673 are clearly at variance, not only with each other, but with the decisions of this and other courts, and this question should be settled by this court.

The libellant, petitioner herein, submits that, by the decision complained of, the lower court has in fact authorized an interpretation and construction of U. S. Code, Title 46, Sections 596, 673, 685, 741, 742 and 746 contrary to the clear and unambiguous language in which the statutes were drafted by Congress, and the court reached its decision only by failing and refusing to give the language of these sections their clear meaning.

POINT V.

The judgment or decree, signed August 12, 1932, and entered August 15, 1932, was never vacated or set aside, and the court erred in entering the decree dated March 9, 1933.

The Court of Appeals in its opinion (R., 218) devotes considerable space to a discussion of the decree signed August 12, 1932 and entered August 15, 1932, and the decree signed March 8, 1933 and entered March 9, 1933. Although these questions do not go to the merits of the construction of the sections of the Seamen's Act, particularly U. S. Code, Title 46, Sections 596, 673, 685, 741, 742 and 746, and the constitutional points involved, the Court of Appeals deemed them important (R., 217-219).

The first judgment or decree in this action was signed by the District Court on *Friday,* August 12, 1932, after a hearing in relation to its form, at which time both sides were represented and the form of the decree agreed upon (R., 153). *Saturday,* August 13, 1932, was a half holiday. The judgment or decree was entered *Monday,* August 15, 1932. The letter of the proctor for the respondent, requesting a rehearing in this case, is dated August 13, 1932. This was *Saturday.* A copy was sent to the proctor for the libellant but it was not received by him until *Monday,* August 15, 1932.

> The Circuit Court of Appeals stated (R., 218): "* * * * It is apparent that the entry of the decree of August 15th two days after the request for rehearing was made was irregular. At that time the matter of a rehearing was pending and a rehearing without restriction was granted August 30th * * * *"

There is absolutely nothing in the record to uphold this conclusion. While it is true the letter on behalf of the respondent was dated August 13, 1932, which was a Saturday, there is nothing to show that it was sent to or received by the court on or before Monday, August 15th, or in fact, on or before August 30th (R., 155).

No motion was made to vacate or modify the decree of August 15, 1932. In the opinion of the District Court, modifying the decree of August 15, 1932, the court said (R., 156):

> "By memorandum opinion, dated August 30, 1932, a reargument of this case was granted * * * The decision previously rendered is modified * * *"

A decision is not a decree. *G. Amsinck v. Springfield Grocery Co.,* 7 Fed. (2) 855, 858, 859.

The case of *Hook v. Mercantile Trust Co. of N. Y.* 95 Fed. 41, cited by the Circuit Court of Appeals, is one where a decision had been handed down by the Court of Appeals, but it does not appear that any judgment had been entered thereunder. A motion was made by both sides for a rehearing and the motion was granted, and upon the rehearing the decision was modified.

POINT VI.

The respondent, the United States, did not plead that the relief, provided for by R. S. 4529 (46 U. S. Code, Sec. 596), was a penalty, and made no motion to amend its pleadings.

On the hearing before the District Court on the motion for a reargument of the case, a point was raised by the libellant, petitioner herein, that the respondent, the United States, had not pleaded that the relief, provided for by R. S. 4529 (46 U. S. Code, Sec. 596), was a penalty. Notwithstanding this, the respondent made no motion to amend its pleadings. If the contention of the respondent was correct, and the relief provided for by R. S. 4529 (46 U. S. Code, Sec. 596) was a penalty, the proctor for the respondent knew, or claimed he knew, or he should have known it at the time of the argument on the rehearing, but he did not make any motion to amend his pleadings. The respondent admitted that jurisdiction had been obtained, and it was found by the Circuit Court of Appeals that the vessel in question, the S. S. *American Shipper*, "was owned by the United States and was a merchant vessel subject to the provisions of Section 2 of the Seamen's Act of March 4, 1915 (46 U. S. Code, Sec. 673)." (R., 216.)

The respondent, not having raised in its pleadings the question that the relief provided for by R. S. 4529

(46 U. S. Code, Sec. 596) was a penalty, and having made no motion to amend its pleadings, it should not have been allowed to raise that question. This point was presented to the Circuit Court of Appeals, but they did not pass upon it in any way.

In the case of *Avery v. United States,* 12 Wall. 304, the court said (p. 306):

> "It is a familiar principle that no one can be relieved against a judgment, however unjust he may consider it, if he had a defense and, through his own fault, failed to present it * * * * It would lead to endless embarrassments in the administration of justice, if a party were permitted to reopen a judgment on the ground that he had a defense that he did not present, because ignorant of it, but which, the court can see, he could have known if he had used reasonable diligence to ascertain it."

It is of the utmost importance, not only to this case but for the information of the bench and bar of this country, that this question of pleading be decided by this court.

Conclusion.

The situation found to exist in the present case aptly demonstrates the soundness of the rule laid down in Elman v. Moller (11 Fed. 2d 55), where Rose, C. J., said:

> "The Courts should act promptly and vigorously to vindicate all the rights of seamen as well those recently conferred on them as those which date from time immemorial."

It is respectfully submitted that the petition for a writ of *certiorari* should be granted.

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